INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument:	
I. The Fair Labor Standards Act authorizes the Administrator to make routine inspections without first proving that he has reason to believe that the employer inspected has violated the Act	8
II. The Fourth Amendment does not limit the Administrator's right of inspection to instances where he has reason to believe that the employer has violated the Act	13
III. The Administrator's right of inspection is not limited to the records of those employees whom petitioner believes to be subject to the Act	17
Conclusion	18

CITATIONS

Cases:

Baltimore & Ohio R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612	15, 16, 17
Bartlett Frazier Co. v. *Hyde*, 65 F. (2d) 350, certiorari denied, 290 U. S. 654	13, 14, 15, 16
Chicago Board of Trade v. *Olsen*, 262 U. S. 1	13, 17
Consolidated Rendering Co. v. *Vermont*, 207 U. S. 541	12
Electric Bond & Share Co. v. *Securities & Exchange Commission*, 303 U. S. 419	13, 17
Federal Trade Commission v. *American Tobacco Company*, 264 U. S. 298	10, 11, 12, 14, 15
Federal Trade Commission v. *Baltimore Grain Co.*, 284 Fed. 886, aff'd, 267 U. S. 586	10
Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160	11
Federal Trade Commission v. *Maynard Coal Co.*, 22 F. (2d) 873	11
Federal Trade Commission v. *Smith*, 34 F. (2d) 323	11
Flint v. *Stone Tracy Co.*, 220 U. S. 107	13
Garske v. *United States*, 1 F. (2d) 621	16
Gouled v. *United States*, 255 U. S. 298	16

Cases—Continued. Page
Hale v. *Henkel*, 201 U. S. 43 ..... 13, 16
Interstate Commerce Commission v. *Baird*, 194 U. S. 25 13
Interstate Commerce Commission v. *Brimson*, 154 U. S. 447 13
Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U. S. 194 ..... 13, 16, 17
Newfield v. *Ryan*, 91 F. (2d) 700, certiorari denied, 302 U. S. 729 17
Schencks v. *United States*, 2 F. (2d) 185 16
United States v. *Clyde S. S. Co.*, 36 F. (2d) 691, certiorari denied, 281 U. S. 744 ..... 17, 18
United States v. *Katz*, 271 U. S. 354 13
United States v. *Lefkowitz*, 285 U. S. 452 16
United States v. *Louisville & N. R. Co.*, 236 U. S. 318 13
Wagner v. *United States*, 8 F. (2d) 581 16
Wilson v. *United States*, 221 U. S. 361 16
Woods v. *United States*, 279 Fed. 706 16

Constitution and Statutes:
Fourth Amendment to the Constitution 13–16
Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Supp. V, Title 29, Sec. 201) 2, 8–10
Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717; U. S. C., 1934 Ed., Title 15, Secs. 49 and 50) 2, 9–11
Grain Futures Act, c. 369, 42 Stat. 998, U. S. C., Title 7, Secs. 1–17 ..... 14, 15

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 407

MONTGOMERY WARD & CO., INCORPORATED,
PETITIONER

v.

PHILIP B. FLEMING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 215) is reported in 30 F. Supp. 360. The opinion of the Circuit Court of Appeals (R. 248) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 17, 1940 (R. 262). The petition

for a writ of certiorari was filed September 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 11 (a) of the Fair Labor Standards Act of 1938 authorizes the Administrator of the Wage and Hour Division of the United States Department of Labor to make routine inspections of employers' records containing information as to the wages paid to and hours worked by their employees.

2. Whether the Fourth Amendment limits the authority to make inspections conferred upon the Administrator by Section 11 (a) of the Act to instances where he has information tending to show that the employer has violated the Act.

3. Whether the Administrator's authority to inspect records material to his investigation may be defeated on the ground that such records include information relating to some employees who may not be covered by the Act or who may be excepted therefrom by specific exemptive provisions.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C., Supp. V, Title 29, Sec. 201 *et seq.*) and Sections 9 and 10 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717;

U. S. C., Title 15, Secs. 49 and 50), certain provisions of which are made applicable to the jurisdiction, powers and duties of the Administrator by Section 9 of the Fair Labor Standards Act, are set forth in full in the appendix to the petition and supporting brief, pages 25–49.

STATEMENT

In April 1939, pursuant to the provisions of Section 9 of the Fair Labor Standards Act,[1] the Administrator of the Wage and Hour Division of the United States Department of Labor instituted this proceeding in the District Court to require petitioner to produce before the Administrator or an officer of the Wage and Hour Division designated by him certain records described in an administrative subpoena *duces tecum* previously directed to petitioner by the Administrator.[2]

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[1] By Section 9 of the Fair Labor Standards Act the provisions of Sections 9 and 10 of the Federal Trade Commission Act "relating to the attendance of witnesses and the production of books, papers, and documents" are "made applicable to the jurisdiction, powers, and duties of the Administrator". Section 9 of the Federal Trade Commission Act empowers the Commission "to require by subpoena the attendance and testimony of witnesses and the production of * * * documentary evidence relating to any matter under investigation", and gives the district courts jurisdiction to require obedience to subpoenas issued by the Commission.

[2] An identical subpoena *duces tecum* was directed to Stuart S. Ball, secretary of petitioner (R. 44–45), and the Administrator's application to the District Court named him as a respondent and requested enforcement of the sub-

The verified application of the Administrator (R. 1–9) alleged that petitioner is engaged in a nation-wide general merchandising business and employs employees engaged in interstate commerce and in the production of goods for such commerce, within the meaning of the Act (R. 3–4); that during the course of an investigation of petitioner's Kansas City, Missouri, mail order house, petitioner refused to permit inspectors of the Wage and Hour Division to examine its records relating to the wages paid to and hours worked by the employees employed there (R. 4–5); that the Administrator thereupon issued an order for investigation, reciting that he had reasonable grounds to believe that petitioner had violated certain provisions of the Act, and directing that an investigation be made to determine whether it had (R. 5, 40–42); that thereafter the subpoena *duces tecum* in question was issued and served upon petitioner (R. 5, 43); that upon the return date of the subpoena petitioner appeared but refused to produce the records demanded and instead filed a motion to quash the subpoena (R. 6); that the Administrator thereafter denied petitioner's motion, but that notwithstanding this petitioner persisted in its refusal to produce the records (*ibid.*). The application further alleged that petitioner's refusal to produce the records demanded by the subpoena impeded the prog-

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poena as to him (R. 2–9). The final order of the District Court dismissed the application as to Ball (R. 227).

ress of the Administrator's investigation and that the records were material, necessary, and appropriate to determine whether petitioner had violated any of the provisions of the Act (R. 7–8).

The Administrator's subpoena, a copy of which was attached to the application, demanded the production (1) of petitioner's " 'Gross Earnings Report' containing entries as to the wages paid" to its Kansas City mail order house employees during the period from the week ending October 27, 1938,[3] to April 11, 1939, "together with the supporting timeclock cards" of such employees, and (2) of "Records showing number of hours scheduled" for each department of the Kansas City house during the same period and "the number of hours actually worked" by each department (R. 43). In his application, however, the Administrator, relying upon petitioner's assurance that it did not have a record of hours actually worked by the departments of the Kansas City house, did not ask for the production of such records (R. 8).

Petitioner replied, in the form of an "answer" to the application (R. 47–110), admitting the allegations of the application with respect to its employment of employees engaged in interstate commerce and in the production of goods for such commerce and its refusal to produce the records demanded by the Administrator's subpoena (R.

[3] The Act became effective October 24, 1938 (Sections 6 (b), 7 (d), 15 (a)).

47), denying that the records demanded by the subpoena were relevant to the Administrator's investigation (R. 48, 52) and that the Administrator had reasonable grounds to believe that petitioner had violated the Act (R. 51–52), and alleging affirmatively that it had, before and after the issuance of the subpoena, offered to make available to the Administrator "all record information relative to any complaint which had been made" (R. 49–50). Petitioner also alleged that the subpoena constituted an unreasonable search and seizure within the meaning of the Fourth Amendment (R. 52–55).[4]

The Administrator filed a reply to petitioner's "answer" in which he denied that petitioner had offered to produce records relative to complaints of violations of the Act and alleged that the only offer petitioner had ever made was to produce records regarding employees whom petitioner had classified as executive and administrative employees and as to whom petitioner had admittedly violated the Act and the Administrator's regulations defining such employees (R. 111–114).[5]

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[4] Petitioner's "answer" concluded with allegations that the Fair Labor Standards Act is unconstitutional in several respects (R. 55–58). These contentions were abandoned on the appeal. (See R. 249.)

[5] Section 13 (a) (1) of the Act excepts from the wage and hour provisions of Sections 6 and 7 "executive" and "administrative" employees, "as such terms are defined and delimited by regulations of the Administrator". The Ad-

At the outset of the hearing before the District Court petitioner objected that the court should not hear argument upon the application and the order to show cause (R. 46) without first requiring the Administrator to adduce evidence to show that he had reasonable grounds to believe that petitioner had violated the Act and affording petitioner an opportunity to adduce evidence in rebuttal (R. 157–159). The court overruled this objection (R. 159), but granted petitioner permission to make written offers of proof (R. 163). Petitioner filed such offers (R. 168–170, 172–180, 192–194, 196–198), which were designed to show that petitioner had not violated the Act and that the Administrator had no reasonable grounds to believe that it had. The Administrator filed objections thereto (R. 170–172, 180–192, 194–195, 198–199), mainly on the ground that the proffered evidence was not pertinent to the determination of the application.

The order of the District Court sustained the Administrator's objections to petitioner's offers of proof and ordered petitioner to produce before the Administrator's representatives all the records described in the Administrator's subpoena *duces tecum* except records showing the number of hours actually worked by the departments of petitioner's Kansas City mail order house (R. 226–229). In

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ministrator had previously issued regulations defining and delimiting those terms (Title 29, ch. V, Code of Federal Regulations, Part 541).

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its memorandum opinion (R. 215–226) the court held that "Congress had power to require the keeping of the records and that the Administrator may, at his pleasure, require the production of such records" (R. 221).

The Circuit Court of Appeals affirmed the order of the District Court (R. 248–259), holding that under the Act the Administrator's authority to make inspections is "in no degree conditioned upon the existence of reasonable cause for the Administrator to believe that the industry, which is the subject of investigation, is violating the Act" (R. 252), and that the Fourth Amendment does not so limit the Administrator's authority.

Inasmuch as both lower courts stayed the enforcement of their orders pending appeal (R. 264), the preliminary investigation to determine whether petitioner has complied with the Act has thus far been delayed about eighteen months.

ARGUMENT

I

THE FAIR LABOR STANDARDS ACT AUTHORIZES THE ADMINISTRATOR TO MAKE ROUTINE INSPECTIONS WITHOUT FIRST PROVING THAT HE HAS REASON TO BELIEVE THAT THE EMPLOYER INSPECTED HAS VIOLATED THE ACT

The source of the Administrator's power of inspection is Section 11 (a) of the Fair Labor Standards Act, which provides:

> The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other con-

> ditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. * * *

In addition, Section 11 (c) requires every employer subject to the substantive provisions of the Act to make, keep, and preserve such records of the hours and wages of persons employed by him as shall be prescribed by administrative regulation. The power to inspect granted in these provisions is implemented by Section 9, which provides that "For the purpose of any hearing or investigation provided for in this Act, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act * * * are hereby made applicable to the jurisdiction, powers, and duties of the Administrator * * *."

Petitioner contends that these provisions authorize the Administrator to inspect and subpoena the records of only those employers whom he has probable cause to believe have violated the statute. But the purpose of these provisions, as Section 11 (a) indicates, was to enable the Administrator "to de-

termine whether *any person* has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." The general scope of these provisions and the reference in the statute to "any person" are hardly consistent with an intention to limit the right to inspect to employers as to whom evidence has already been obtained. Furthermore, since a showing of probable cause is obviously not a prerequisite to the filing of reports, the use of substantially identical language in Section 11 (c) [6] shows that no such limitation is imposed upon the Administrator's power to inspect. The statute was thus plainly intended to permit the Administrator to make routine inspections of an employer's wage and hour records, irrespective of prior information as to specific violations.

Petitioner does not rely on any express language in the Fair Labor Standards Act (or, for that matter, in the Federal Trade Commission Act) as manifesting an intention to the contrary, but claims that the decision below conflicts with an interpretation allegedly given Section 9 of the Federal Trade Commission Act in *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298.[7]

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[6] Section 11 (c) requires the keeping of such records and the making of such reports as the Administrator shall prescribe "as necessary or appropriate for the enforcement of the provisions of this Act * * *."

[7] Petitioner also cites *Federal Trade Commission* v. *Baltimore Grain Co.*, 284 Fed. 886 (D. Md.), aff'd, mem., 267

But that case arose under the clause in Section 9 of the Trade Commission Act giving to the Commission "access to, * * * and the right to copy any documentary evidence of any corporation being investigated or proceeded against." The issue was whether the language quoted gave the Commission "unlimited right of access" to corporate papers, as it claimed (264 U. S., at 305).

The Fair Labor Standards Act incorporates only those provisions of Section 9 of the Trade Commission Act "relating to the attendance of witnesses and the production of books, papers, and documents," not that giving administrative officials sweeping access to the papers of corporations. It was unnecessary to incorporate the latter power, inasmuch as its equivalent, narrowly confined to material pertinent under the Fair Labor Standards Act, is found in Section 11 (a) of the latter Act, which expressly authorizes the Administrator to inspect records necessary to determine whether any person has violated the Act. Since the Administrator's power to inspect is derived from Section 11 (a) and not from the Trade Commission Act, the decision interpreting the broad language of the latter statute is not applicable, and the al-

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U. S. 586, and *Federal Trade Commission* v. *Smith*, 34 F. (2d) 323 (S. D. N. Y.), but these merely followed the *American Tobacco* decision. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, and *Federal Trade Commission* v. *Maynard Coal Co.*, 22 F. (2d) 873 (App. D. C.), which are also claimed to conflict with the decision below, were decided on grounds having no relation to the issue here.

ledged conflict in statutory construction between the decision below and the *American Tobacco* case disappears.

The vice in the subpoena at issue in the *American Tobacco* case was that it was not limited to documents which would be material or relevant, but extended to substantially all of the respondent's papers. The Court's repeated advertence to the absence of any showing of relevance or materiality in the papers subpoenaed and its approval of an earlier decision [8] on the ground that the requirement there was limited to documents "relevant to the inquiry" show that the basis of the decision was not the absence of probable cause to suspect a violation of law, but the failure to limit the subpoena to papers from which it could be determined whether a violation had occurred.[9] Inasmuch as the subpoena here is restricted to papers which will show the wages paid and the hours worked, the facts most relevant in any inquiry under the Fair Labor Standards Act, the difference between the two cases is patent. Thus even if it be assumed that similar statutory provisions were involved, the *American Tobacco* case is plainly distinguishable.

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[8] *Consolidated Rendering Co.* v. *Vermont*, 207 U. S. 541.

[9] The statement upon which petitioner relies that "Some ground must be shown for supposing that the documents called for do contain" evidence (264 U. S., at 306), when read in its context, means merely that there must be reasonable ground for believing the documents to be relevant, not that, before seeing the evidence, there must be reasonable ground for believing respondent guilty.

Petitioner argues that the Act must be construed in the manner for which it contends so as to avoid violation of the Fourth Amendment. But that Amendment is not applicable. See Point II, *infra*.

II

THE FOURTH AMENDMENT DOES NOT LIMIT THE ADMINISTRATOR'S RIGHT OF INSPECTION TO INSTANCES WHERE HE HAS REASON TO BELIEVE THAT THE EMPLOYER HAS VIOLATED THE ACT

This Court has repeatedly sustained the power of Congress to authorize administrative officials to inspect records and require the production of documents as an incident to the effective enforcement of regulatory statutes. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 473; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25; *Hale* v. *Henkel*, 201 U. S. 43; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Bartlett Frazier Co.* v. *Hyde*, 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654; *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419; *United States* v. *Louisville & N. R. Co.*, 236 U. S. 318; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 174–175; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1; *United States* v. *Katz*, 271 U. S. 354.

Petitioner urges that the Fourth Amendment [10] requires as a prerequisite to such action a showing

[10] The Fourth Amendment reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

of reasonable cause to suspect a violation of the regulatory statute. But none of the many cases upholding the investigatory powers of administrative agencies against attack under the Fourth Amendment contain even a suggestion of such a limitation. The point here raised was specifically rejected in *Bartlett Frazier Co.* v. *Hyde*, 65 F. (2d) 350 (C. C. A. 7th), certiorari denied, 290 U. S. 654, where it was held that the provisions of the Grain Futures Act (42 Stat. 998, U. S. C., Title 7, Secs. 1–17), authorizing inspection of records by representatives of the Secretary of Agriculture, did not violate the Fourth Amendment. The Circuit Court of Appeals there declared that the "statutory purpose of preventing corners and speculation in grains * * * would be seriously embarrassed if the government were powerless to require the information without regard to whether traders such as appellants were suspected of, or charged with, breaking the law. Indeed, the very requirement of the information would of itself have tendency to discourage the unlawful manipulations at which the act is aimed" (65 F. (2d), at 352). On application for a writ of certiorari, petitioners contended that the holding that they were subject to "an unqualified duty to report and the untrammeled right of inspection" (65 F. (2d), at 352) conflicted with the *American Tobacco*

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and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

decision and that the Grain Futures Act, so construed, violated the Fourth Amendment. (See petion and supporting brief in No. 267, October Term, 1933.) This Court denied the petition. *Bartlett Frazier Co.* v. *Wallace,* 290 U. S. 654.

Petitioner's argument that the Fourth Amendment is contravened if the purpose of an investigation is to discover, without prior showing of probable cause, whether or not a law has been violated was rejected in *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, 622, which upheld the power of the Commission to require reports under the Hours of Service Act. The purpose of the reports there required was to ascertain whether the law had been obeyed. This Court declared:

> There is the final objection that to compel the disclosure by these reports of violations of the law is contrary to the Fourth and Fifth Amendments of the Constitution of the United States.
>
> The order of the Commission is suitably specific and reasonable, and there is not the faintest semblance of an unreasonable search and seizure. The Fourth Amendment has no application.

Here again petitioner's chief reliance is upon *Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298. We have already endeavored to show (*supra,* pp. 10–12) that that decision is not applicable here. The issue there was

the scope of the subpoena, not the existence of reasonable cause to suspect violation of the statute, and the Court's remarks with respect to the Fourth Amendment must be read with that in view.

The cases establish that, as applied to the regulatory investigations of administrative agencies, the Fourth Amendment requires only that a demand for the production of documents must be reasonably specific and limited to documents which might be relevant to the inquiry. See *Wilson* v. *United States*, 221 U. S. 361, 372, 375–376; *Baltimore & Ohio R. Co.* v. *Interstate Commerce Comsion, supra; Hale* v. *Henkel*, 201 U. S. 43, 76–77; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 476, 497. This limitation is derived from the guarantee against unreasonable searches and seizures. Petitioner attempts to invoke the provision of the Amendment that "no warrants shall issue, but upon probable cause". As the cases cited by petitioner show,[11] this relates to criminal proceedings, and has never been applied where there has been express statutory authority to inspect records for administrative purposes. Cf. *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission, supra; Bartlett Frazier Co.* v. *Hyde, supra.*

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[11] *Garske* v. *United States*, 1 F. (2d) 621 (C. C. A. 8th); *United States* v. *Lefkowitz*, 285 U. S. 452; *Gouled* v. *United States*, 255 U. S. 298; *Schencks* v. *United States*, 2 F. (2d) 185 (App. D. C.); *Wagner* v. *United States*, 8 F. (2d) 581 (C. C. A. 8th); *Woods* v. *United States*, 279 Fed. 706 (C. C. A. 4th).

III

THE ADMINISTRATOR'S RIGHT OF INSPECTION IS NOT LIMITED TO THE RECORDS OF THOSE EMPLOYEES WHOM PETITIONER BELIEVES TO BE SUBJECT TO THE ACT

Although petitioner admits that it is in interstate commerce and that some of its employees are subject to the Act, it claims that the Administrator's investigatory powers are limited to such employees and that any subpoena which requires it to produce records for all its employees is unlawful.[12]

But it is well settled that investigatory bodies are not restricted in their inquiries to transactions which might be or are subjected to affirmative regulation. *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, 214–216; *Electric Bond and Share Co.* v. *Securities & Exchange Commission,* 303 U. S. 419; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1; *Bartlett Frazier Co.* v. *Hyde, supra; Newfield* v. *Ryan,* 91 F. (2d) 700 (C. C. A. 5th), certiorari denied, 302 U. S. 729; *United States* v. *Clyde S. S. Co.,* 36 F. (2d) 691 (C. C. A. 2d), certiorari denied, 281 U. S. 744. Thus in the *Goodrich* case it was held, over objection, that the Interstate Commerce Commission could require reports as to the operation of a local

[12] Petitioner claims that some of the employees are covered by specific statutory exemptions and that others are engaged in intrastate commerce. The Act, of course, applies to many employees not engaged *in* interstate commerce. See Secs. 6, 7, 3 (j).

amusement park owned by a carrier. The Court recognized that the Commission must have power to acquire information as to such matters "so as to enable it to properly regulate the matters which are within its authority" (224 U. S., at 216).

Petitioner's argument is that each employer can determine in advance which of his employees are subject to the Act and give to the Administrator information only as to such employees. But if the Act is to be effectively enforced, the Administrator must have the power to make his own investigations. It often cannot be known in advance which employees are covered by the Act and which are exempt, and it is not possible for the Administrator to ascertain whether petitioner is "complying with the law, without a complete knowledge of what it was doing" (*United States* v. *Clyde S. S. Co., supra,* at 693). To permit the employer to determine for himself which records he will make available for inspection would halt the Administrator's investigation at the threshold and seriously impair the enforcement of the Act. The court below was clearly correct in holding that the Administrator "is not required to accept respondent's classification of employees" (R. 261).

CONCLUSION

Although this case does present an important question of law, the decision below is clearly in accord with prior decisions of this Court involving similar questions under other statutes. Nor is

there any conflict of decisions in the lower courts. By objecting to the Administrator's power to inspect and by opposing the issuance of the subpoena, petitioner has already delayed for eighteen months the making of a preliminary investigation as to whether it has complied with the Act. In these circumstances it is respectfully submitted that the petition for certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.
THURMAN ARNOLD,
Assistant Attorney General.
ROBERT L. STERN,
GEORGE A. MCNULTY,
Special Assistants to the Attorney General.
GERARD D. REILLY,
Solicitor,
IRVING J. LEVY,
Assistant Solicitor,
ROBERT S. ERDAHL,
Attorney,
Department of Labor.
OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940